Supreme Court, U.S.
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No.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1997

ROBYN ASTAIRE,
Petitioner,

VS.

BEST FILM & VIDEO CORPORATION,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether an important state-law question of first impression should be certified to the highest state court, when the court of appeals based its decision exclusively on its interpretation of a state statute as to which no state appellate court has issued an opinion, the panel majority acknowledged a "fairly convoluted statutory scheme," a dissenting member of the panel offered a different interpretation of the statute, and a state provision enacted after the decision creates a process by which state-law questions may be certified to the highest state court.

PARTIES TO THE PROCEEDING

The parties to the proceeding below and before this Court are:

1. Robyn Astaire; and
2. Best Film & Video Corporation.[1]

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[1] Best Film & Video Corporation has no parent company, nor does it have any subsidiary that is not wholly owned.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES TO THE PROCEEDING	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	2
STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	2
A. Summary	2
B. California Civil Code Section 990	3
C. Proceedings Below	4
1. The Ninth Circuit Court of Appeals Majority Opinion And Dissent	4
2. The Amended Opinion	6
3. Newly Enacted California Rule of Court 29.5	7
REASONS FOR GRANTING THE PETITION	
I. In Light Of The Fact That This Case Presents An Important State Law Issue Of First Impression, The Ninth Circuit Abused Its Discretion In Denying The Request For Certification Of The State-Law Question	8
II. Given the Panel Majority's Statement That The Statute Is A "Fairly Convoluted Statutory Scheme," The California Supreme Court Should Be Given The Opportunity To Resolve The State-Law Question	16
CONCLUSION	18
APPENDIX	A-E

TABLE OF AUTHORITIES

Cases

	Page
Alaska Airlines, Inc. v. United Airlines, Inc., i.e., 902 F.2d 1400 (9th Cir. 1990)	13
Aldrich v. Aldrich, 375 U.S. 75, 84 S.Ct. 184 (1964)	12
Bellotti v. Baird, 428 U.S. 132, 96 S.Ct. 2857, 49 L.Ed.2d 844 (1976)	11
Clay v. Sun Insurance Office, Ltd., 363 U.S. 207, 80 S.Ct. 1222 (1960)	8, 10, 11
Coughlin v. Tailhook Ass'n, 112 F.3d 1052, 1063 (9th Cir. 1997)	14
Diamond v. Oreamuno, 24 N.Y.2d 494, 248 N.E.2d 910 (1969)	10
Dresner v. City of Tallahassee, 375 U.S. 136, 84 S.Ct. 235 (1963)	12
Elkins v. Moreno, 435 U.S. 647, 98 S.Ct. 1338, 55 L.Ed.2d 1338 (1978)	11, 12
Kunz v. Utah Power & Light Company, 871 F.2d 85, 88 (9th Cir. 1989)	13
Lehman Bros. v. Schein, 416 U.S. 386, 94 S.Ct. 1741, 40 L.Ed.2d 215 (1974)	9, 10, 11
Meckert v. Transamerica Ins. Co., 742 F.2d 505 (9th Cir. 1984)	13
Smith v. Cutter Biological, Inc., 911 F.2d 374 (9th Cir. 1984)	14
Virginia v. American Booksellers Ass'n, 484 U.S. 383, 108 S.Ct. 636, 98 L.Ed.2d 782) (1988)	12
Waters v. Armstrong World Industries, Inc., 773 F.2d 248, 250 (9th Cir. 1985)	13

TABLE OF AUTHORITIES

CASES

	Page
White v. Celotex Corp., 907 F.2d 104, 106 (9th Cir. 1990)	16
Zant v. Stephens, 456 U.S. 410, 102 S.Ct. 1856, 72 L.Ed.2d 222 (1982)	12

Statutes and Rules

28 U.S.C. § 1332 2
28 U.S.C. § 1254(1) 2
Alaska Appellate Rule 407 13
California Civil Code § 990 .....2, 3, 5, 6, 7, 8, 16, 17
California Civil Code § 990(a) 3, 4
California Civil Code § 990(n) 4, 6, 7, 14, 15, 16
California Civil Code § 990(n)(1) 2, 3, 4, 5, 6, 7
California Civil Code § 990(n)(2) 4, 5
California Civil Code § 990(n)(3) 4, 5, 6
California Civil Code § 990(n)(4) 4, 5, 6
California Rule of Court 29.5 .....2, 3, 7, 8, 11, 17, 18
Florida Appellate Rule 4.61 10
Hawaii Rule of Appellate Procedure 13 14
Idaho Appellate Rule 12.1 .....13, 14
Maryland Cts. & Jud. Proc. Code 12-601 12
Massachusetts Rule of Court 3:21 11
Nevada Rule of Appellate Procedure 5 14

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PETITION FOR A WRIT OF CERTIORARI

Robyn Astaire respectfully petitions for a *writ of certiorari* to review the judgment of the United States Court of Appeals for the Ninth Circuit (and, more specifically, denial of her petition for rehearing and certification of a state law issue to the California Supreme Court) in this case.

OPINIONS BELOW

The decision of the Court of Appeals for the Ninth Circuit (App., *infra*, A-1) is reported as *Robyn Astaire v. Best Film & Video Corp.*, 116 F.3d 1297 (9th Cir. 1997); the opinion was subsequently amended and reported at 136 F.3d 1208 (9th Cir. 1998) (App., *infra*, B-1).

JURISDICTION

The jurisdiction of the district court was invoked under 28 U.S.C. § 1332 (diversity of citizenship). The court of appeals entered its judgment on June 20, 1997; the judgment and order were amended on February 19, 1998. The notice of reassignment of the case was filed on April 30, 1998. The notice of extension to file Writ of Certiorari was entered on May 13, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

A. Section 990 of the California Civil Code.

B. California Rule of Court 29.5.

Relevant portions of these statutory provisions are reproduced at App., *infra,* D-1 to D-5; E-1 to E-4.

STATEMENT OF THE CASE

A. Summary

This case arises out of a civil lawsuit alleging unauthorized use of legendary performer Fred Astaire's likeness, in violation of California Civil Code section 990 ("section 990"). Petitioner Robyn Astaire ("Mrs. Astaire") is the widow of Fred Astaire, and succeeded to all rights in his name, voice, signature, photograph and likeness under section 990; in 1989, she sued respondent Best Film & Video ("Best") in federal district court alleging *inter alia* that dance instructional videotapes manufactured and produced by Best violated her rights under section 990 through the unauthorized use of Fred Astaire's image as it appears in film clips taken from two of his movies (*Second Chorus* and *Royal Wedding*). App., *infra,* B-8.

On summary judgment, the district court concluded that Best's unauthorized use of Fred Astaire's likeness violated the prohibition in section 990 against the unauthorized use of a celebrity's persona "on or in products, merchandise, or goods." Over a dissent by Circuit Judge Shroeder, however, the Ninth Circuit Court of Appeals reversed the judgment in an opinion filed June 20, 1997: even assuming that Best had used Fred Astaire's likeness for advertising purposes within the meaning of section 990, subdivision (a), the panel majority held in an opinion authored by Senior Circuit Judge Wiggins that such unauthorized advertising use nonetheless fell within a statutory *exemption* set forth in subdivision (n) of section 990. App., *infra,* D-5.

After the Ninth Circuit Court of Appeals reversed and remanded, petitioner filed a petition for rehearing *en banc;* the petition was denied, and the written opinion originally filed was amended on February 19, 1998. App., *infra,* B-1. In the interim, the California Supreme Court enacted California Rule of Court 29.5, expressly permitting a federal court to certify state law issues to the California Supreme Court. Mrs. Astaire filed a motion to stay issuance of the mandate and to certify the state law question (namely, interpretation of section 990) to the California Supreme Court under Rule 29.5; petitioner also filed a petition for rehearing on the same grounds. On April 13, 1998, the panel denied the motion to stay issuance of the mandate and to certify question to the California Supreme Court and also denied the motion to file the petition for rehearing. App., *infra,* C-1.

B. California Civil Code Section 990

As noted above, Mrs. Astaire brought suit under section 990, a California statute which creates a cause of action for the unauthorized use of a deceased personality's persona. The statute provides that "[a]ny person who uses a de-

ceased personality's name, voice, signature, photograph, or likeness, in any manner, on or in products, merchandise, or goods, or for purposes of advertising or selling, or soliciting purchases of, products, merchandise, goods, or services, without prior consent . . . shall be liable . . . " App., *infra,* D-1.

Subsections (n)(1) through (4) of section 990 provide, however, that this section shall not apply to the use of a deceased personality's name, voice, signature, photograph, or likeness, in any of the following instances: (1) a play, book, magazine, newspaper, musical composition, film, radio or television program, other than an advertisement or commercial announcement not exempt under paragraph (4); (2) material that is of political or newsworthy value; (3) single and original works of fine art; and (4) an advertisement or commercial announcement for a use permitted by paragraph (1), (2), or (3). App., *infra,* D-5.

C. Proceedings Below

1. The Ninth Circuit Court of Appeals Majority Opinion and Dissent

As the court of appeals panel expressly stated, the district court made the following legal determinations in entering a judgment for Mrs. Astaire: (1) Best's use of the Astaire film clips was covered by section 990(a)'s "on or in products, merchandise, or goods" language; (2) Best's use of the Astaire film clips was not a use for "advertising, selling, or soliciting" in violation of section 990(a); (3) Best's use of the Astaire film clips was not exempt under section 990(n); (4) Mrs. Astaire's section 990 claim was not preempted by the federal Copyright Act; and (5) Best's use of Astaire's likeness was not protected by the First Amendment. App., *infra,* B-10.

Since the case involved a California statute, the panel initially acknowledged that, "[f]or questions of California

law, we must apply the law as we believe the California Supreme Court would apply." App., *infra,* . In light of the fact no California court has interpreted the provisions of section 990, the panel further observed that (in the absence of a California Supreme Court decision) it was required to "predict how the California Supreme Court would decide the issue, using intermediate appellate court decisions, decisions from other jurisdictions, statutes, treatises and restatements as guidance." App., *infra,* B-10. Moreover, the panel observed, " . . . if Best's use is exempt from § 990 liability altogether, we need not reach the other issues presented by this case." App., *infra,* B-11.

Following a brief recitation of California law on statutory interpretation, the majority proceeded to "predict how the California Supreme Court would decide the issue." App., *infra,* B-10. The majority concluded that subsection (n)(1) of section 990 limits the exemption for use in a play, book, magazine, newspaper, musical composition, film, radio or television program, so that such uses are not exempt if they are advertisements or commercial announcements. App., *infra,* D-5. According to the panel majority, however, that limitation is *itself limited*: such advertisements or commercial announcements *may still be exempt* under subsection (n)(4) of section 990 — described in the opinion as "the provision which exempts advertisements and commercial announcements for the uses described in subsections (n)(1), (n)(2), and (n)(3). App., *infra,* D-5.

The panel majority thus concluded that the determination of whether a use is exempt under subsection (n)(1) requires reference to subsection (n)(4), which in turn "refers back" to subsections (n)(1), (n)(2), and (n)(3). Given this somewhat tortured construction of the statute, the panel characterized the provisions set forth in section 990 as a *"fairly convoluted statutory scheme."* App., *infra,* B-13. The panel majority concluded that "Best's videotapes are among

the uses exempted by the first part of subsection (n)(1)" — and that "subsection (n)(4) provides that even if Best's use of the Astaire film clips is an advertisement or commercial announcement, such a use is exempt from liability." App., *infra,* B-15. On that basis, the majority reversed the district court ruling and remanded with instructions to enter judgment in favor of Best. App., *infra,* B-21.

In her dissenting opinion, however, Circuit Judge Schroeder expressly stated that "the statute is not as clear as judges would like." App., *infra,* B-21. In her view, "the majority goes wrong when it holds that this use of the Astaire footage is exempt as an 'advertisement or commercial announcement' of an exempt use." App., *infra,* B-21. She termed "incorrect" the majority's reasoning that the language of subsection (n)(4) exempts all announcements for plays, films, videotapes, and so on — since that subsection exempts *only* advertisements or commercial announcements for uses permitted in the earlier paragraphs. App., *infra,* B-22. The majority's interpretation of section 990(n), she commented, would permit one to "with impunity hawk a videotape on fashion for the next century by introducing it with footage of Jacqueline Kennedy"; concluding that section 990 was intended to prevent (and not immunize) such exploitation, Judge Schroeder dissented from the majority's conclusion. App., *infra,* B-22.

2. The Amended Opinion

In denying Mrs. Astaire's subsequent petition for rehearing *en banc,* the panel dismissed the suggestion that its interpretation of § 990(n) raised the "spectre of a 'draconian' destruction of 'legitimate publicity rights' . . ." App., *infra,* B-16. In fact, the panel stated that Mrs. Astaire was "asking courts to make a content-based decision every time a filmmaker or author uses the name or image of celebrity"; this would "create uncertainty in the law," and "there is no

suggestion within § 990 or its legislative history that the California state legislature intended such an inquiry." App., *infra,* B-17. Accordingly, the panel suggested Mrs. Astaire's proposed interpretation of section 990(n) would result in absurdity — and it thus could not consider her interpretation (which it described as ignoring the language in section 990(n)(1)), to be more reasonable than that adopted by the panel majority. App., *infra,* B-15 to B-16.

3. Newly Enacted California Rule of Court 29.5

Effective January 1, 1998, newly adopted California Rule of Court 29.5 (expressly governing "Questions of state law certified by federal appellate courts and other courts") establishes a procedure by which a state law question may be certified to the California Supreme Court in the event the decisions of the California appellate courts provide no controlling precedent concerning the certified question. Subdivision (a) of Rule 29.5 provides that "[t]he California Supreme Court may answer questions of law certified to it by the Supreme Court of the United States, a United States Court of Appeals, or the court of last resort of any state, territory, or commonwealth . . . App., *infra,* E-1.

Relying on newly enacted Rule 29.5 in her second petition for rehearing and motion for stay of mandate, Mrs. Astaire requested that the court of appeals exercise its newly conferred authority to certify this state law question to the California Supreme Court — and resolve any ambiguity in section 990(n) (thereby providing an indisputably correct answer to the key question of statutory interpretation at issue in this case). Since Rule 29.5 was enacted after the case had initially been briefed and argued, no device previously existed by which the state law question could have been certified to the California Supreme Court. As noted above, the panel declined to exercise its discretion to so

certify the state law question to the California Supreme Court, App., *infra,* C-1.

REASONS FOR GRANTING THE PETITION

The refusal by the court of appeals to certify the state-law question in this case so departs from customary Ninth Circuit procedure as to warrant exercise of this Court's supervisory power. Given precedent in both the Ninth Circuit Court of Appeals and this Court, it was an abuse of discretion to deny Mrs. Astaire's motion for stay of mandate and certification to the California Supreme Court pursuant to California Rule of Court 29.5, *in light of the fact that* the case was decided exclusively by the panel majority's interpretation of section 990, the text of section 990 clearly admits of varying interpretations, the dissenting member of the panel rejected the majority's interpretation of the statute, and no California appellate court has rendered an opinion on its provisions.

I.

In Light Of The Fact That This Case Presents An Important State Law Issue Of First Impression, The Ninth Circuit Abused Its Discretion in Denying The Request For Certification Of The State-Law Question

The device of certifying a question of state law as to which there is substantial doubt to the highest court of a state is not novel. In *Clay V. Sun Insurance Office, Ltd.,* 363 U.S. 207, 80 S.Ct. 1222 (1960), for instance, the preliminary question of state law before the Fifth Circuit Court of Appeals involved a Florida statute; finding the state law uncertain, the Circuit Court of Appeals decided instead to decide the constitutional question that would be presented only if Florida law did not apply. *Clay,* 363 U.S. at 209, 80 S.Ct. at 1224. This Court vacated the judgment of

the Fifth Circuit Court of Appeals, on the ground that the constitutional issue should only have been reached if, after decision of two non-constitutional questions, decision was compelled. *Clay,* 363 U.S. at 209, 80 S.Ct. at 1224.

Observing that both questions not disposed of by the Court of Appeals were questions of local law, the Court also noted that the questions were ones on which the state court's determination was controlling. *Clay,* 363 U.S. at 212, 80 S.Ct. at 1225-1226. Since the Court of Appeals indicated it could not make a confident guess as to how the Florida Supreme Court would construe the statute, this Court pointed out that the "Florida Legislature, with rare foresight, has dealt with the problem of authoritatively determining unresolved state law involved in federal litigation by a statute which permits a federal court to certify such a doubtful question of state law to the Supreme Court of Florida for its decision." *Clay,* 363 U.S. at 212, 80 S.Ct. at 1226.

Thus, in vacating the judgment below in order to permit possible disposition on non-constitutional grounds, this Court strongly suggested that certification (then a novel procedure) be used to accomplish this. The certification procedure has, in fact, been used on a number of occasions since *Clay.* In 1974, for example, this Court gave strong endorsement to certification of state questions under the same Florida statute, holding that certification could be used even in a diversity case that raised no constitutional issue. *Lehman Bros. v. Schein,* 416 U.S. 386, 94 S.Ct. 1741, 40 L.Ed.2d 215 (1974).

In *Lehman Bros.,* shareholder diversity suits were brought in federal court in New York against a Florida corporation; both the district court and the Second Circuit Court of Appeals held that Florida law was controlling. *Lehman Bros.,* 416 U.S. at 387-388, 94 S.Ct. at 1742. Although the Court of Appeals held that Florida law was controlling, "it

found none that was decisive." *Lehman Bros.*, 416 U.S. at 389, 94 S.Ct. at 1743. Accordingly, the court of appeals turned to the law of other jurisdictions (particularly that of New York) to predict what Florida would "probably" do. *Ibid.*. In so doing, the panel majority then determined that Florida "would probably" interpret *Diamond v. Oreamuno*, 24 N.Y.2d 494, 248 N.E.2d 910 (1969), to make it applicable — "viewing the case as the Florida court would probably view it." *Lehman Bros.*, 416 U.S. at 389, 94 S.Ct. at 1743.

The dissenter on the Court of Appeals urged, however, that the state-law question be certified to the Florida Supreme Court (under the same statute invoked in *Clay*). *Lehman Bros.*, 416 U.S. at 389-390, 94 S.Ct. at 1743. This Court agreed and vacated the judgment of the Second Circuit, remanding the case to enable the court of appeals to reconsider whether the controlling issue of Florida law should be certified to the Florida Supreme Court pursuant to Rule 4.61 of the Florida Appellate Rules. *Lehman Bros.*, 416 U.S. at 391-92, 94 S.Ct. at 1744. Although the Court cautioned that it was not suggesting that resort to the certification procedure is obligatory where there is doubt as to local law and where the certification procedure is available, it observed that such resort "does... in the long run save time, energy, and resources and helps build a cooperative judicial federalism." *Lehman Bros.*, 416 U.S. at 390-391, 94 S.Ct. at 1744.

Unlike *Clay* (a constitutional law case), *Lehman Bros., v. Schein* was a diversity case dealing with insider trading, and thus did not require certification as an alternative to abstention. In this respect, the facts here are identical to those in *Lehman Bros.*: as in *Lehman*, this is a diversity case which does not require certification as an alternative to abstention. Further, this case also involves a state law as to which no state appellate court has issued an opinion — as a result of which the court of appeals in this case (as in

Lehman Bros.) ostensibly turned to the law of other jurisdictions to predict how the California Supreme Court would "probably" rule.

Thus this case presents (as both *Clay* and *Lehman Bros.* did) a state law issue of first impression: as such, the court of appeals should have certified the question of whether section 990(n) indeed exempted the use of the Astaire film clips to the California Supreme Court under California Rule of Court 29.5, as expressly asked to do so by Mrs. Astaire in her motion for stay of mandate and petition for rehearing. In failing to do so, the court of appeals acted in contravention of the policy underlying this Court's precedent and its own precedent. Since *Lehman Bros.*, the Supreme Court has used the certification procedure on a number of occasions. For example, in *Belloti v. Baird*, 428 U.S. 132, 96 S.Ct. 2857, 49 L.Ed.2d 844 (1976), the Court held that the three-judge district court should have certified questions as to the construction of a state law there at issue to the Massachusetts Supreme Judicial Court before passing upon its constitutionality, *Bellotti*, 428 U.S. 146-147, 96 S.Ct. 2866. The Court noted that the Supreme Judicial Court of Massachusetts had adopted a Rule of Court under which an issue of interpretation of Massachusetts law may be certified directly to that court for prompt resolution (namely, Rule 3:21)), *Bellotti*, 428 U.S. 150, 96 S.Ct. 2867.

Similarly, in *Elkins v. Moreno*, 435 U.S. 647, 98 S.Ct. 1338, 55 L.Ed.2nd 1338 (1978), this Court itself certified a question of state law to the Maryland Court of Appeals, even though the parties had not sought such relief and even though the district court and the court of appeals previously had resolved the disputed point of state law. *Elkins*, 435 U.S. at 662, 98 S.Ct. at 1347. The Court concluded that "it is obviously desirable that questions of law which . . . are both intensely local and immensely important to a wide spectrum of state government activities be decided in the

first instance by state courts." *Elkins*, 435 U.S. at 663 n. 16, 98, S.Ct. at 1347 n. 16. Accordingly, the Court certified a state law question to the Court of Appeals of Maryland pursuant to section 12-601 of the Md. Cts. & Jud. Proc. Code. *Elkins*, 435 U.S. at 668, 98 S.Ct. at 1350.

In *Virginia v. American Booksellers Ass'n*, 484 U.S. 383, 108 S.Ct. 636, 98 L.Ed.2d 782 (1988), this Court certified two state-law questions to the Virginia Supreme Court pursuant to its certification Rule 5:42; in so doing, the Court further observed that certification, in contrast to the more cumbersome and problematic abstention doctrine, is a more expeditious method of obtaining that construction. *Virginia*, 484 U.S. at 396, 108 S.Ct. at 644. Similarly, in *Zant v. Stephens*, 456 U.S. 410, 102 S.Ct. 1856, 72 L.Ed.2d 222 (1982), this Court certified a state law question (concerning imposition of the death penalty) to the Georgia Supreme Court — having noted that the Georgia Supreme Court under certain circumstances will decide questions of state law upon certification from the Court, pursuant to § 4536 of the Ga. Code, *Zant*, 456 U.S. at 416, 102 S.Ct. at 1859.

Likewise, in *Aldrich v. Aldrich*, 375 U.S. 75, 84 S.Ct. 184 (1964), the Court declared *per curiam* that it wished to certify a question to the Florida Supreme Court on the grounds that "there are questions of Florida law that are determinative" of the cause before it, "with respect to which questions there seem to be no clear controlling precedents in the decisions of the Supreme Court of Florida." *Aldrich*, 375 U.S. at 75, 84 S.Ct. at 185. This Court also certified a state law question on its own motion in *Dresner v. City of Tallahassee*, 375 U.S. 136, 84 S.Ct. 235 (1963) *(per curiam)* (again to the Supreme Court of Florida pursuant to Rule 4.61 of the Florida Appellate Rules), on the ground that there appeared to be no precise controlling precedents in the decisions of the Supreme Court of Florida. *Ibid.*

Nor is certification of state-law questions to the highest state court a novel procedure within the Ninth Circuit Court of Appeals. For instance, in *Alaska Airlines, Inc. v. United Airlines, Inc.*, 902 F.2d 1400, 1401-1402 (9th Cir. 1990), Alaska Airlines filed a diversity action in the District of Alaska federal court. The Ninth Circuit panel observed that, in a diversity action, the federal district court must apply the choice of law rules prevailing in the state where the court is located. *Alaska Airlines, Inc.*, 902 F.2d at 1402, citing *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496, 61 S.Ct. 1020, 1021, 85 L.Ed. 1477 (1941). The district court was thus bound to apply Alaska choice of law; finding that no Alaska cases were directly on point, the Court of Appeals certified three questions to the Alaska Supreme Court in order to resolve determinative issues of state law (despite the fact that neither party requested certification) pursuant to Alaska Appellate Rule 407. *Alaska Airlines, Inc.*, 902 F.2d at 1402.

In *Meckert v. Transamerica Ins. Co.*, 742 F.2d 505 (9th Cir. 1984), the case before the Court of Appeals presented a pure question of state law — specifically, whether Idaho courts would give effect to an "other owned vehicle" exclusion from the underinsured motorist coverage. Commenting that the case was an appropriate one in which to seek guidance from the Idaho Supreme Court, the Court of Appeals certified the state-law question under that Court's certification procedure (Idaho Appellate Rule 12.1). Idaho Appellate Rule 12.1 was also invoked by the Ninth Circuit Court of Appeals in *Waters v. Armstrong World Industries, Inc.*, 773 F.2d 248, 250 (9th Cir. 1985), in a case presenting pure questions of state law; despite "diligent research," the court found no Idaho cases on point and was thus unable to ascertain how Idaho courts would answer the questions. Accordingly, the court again commented that this was an "appropriate" case in which to seek guidance from the Idaho Supreme Court under its certification procedure. *Ibid.*

In *Kunz v. Utah Power & Light Company*, 871 F.2d 85, 88 (9th Cir. 1989), the Ninth Circuit again found that it was unable to discern how Idaho courts would decide several important state-law issues; the court thus certified three state-law questions to the Idaho Supreme Court under the aegis of Idaho Appellate Rule 12.1. *Ibid.*

Indeed, in *Coughlin v. Tailhook Ass'n*, 112 F.3d 1052, 1063 (9th Cir. 1997), in an opinion *also* authored by Circuit Judge Wiggin, the court of appeals deemed a question of Nevada law determinative of a party's punitive damages liability; in such a circumstance, the court held, it may exercise its authority to certify the question to the Nevada Supreme Court. It then proceeded to certify the state-law question, and requested the Nevada Supreme Court to exercise its discretionary authority under Nevada Rule of Appellate Procedure 5 to accept and decide the question. *Ibid.*

Some guidance as to Ninth Circuit procedure and policy in such matters is provided in *Smith v. Cutter Biological, Inc.*, 911 F.2d 374 (9th Cir. 1990), in which the Ninth Circuit certified two questions of law to the Hawaii Supreme Court pursuant to Hawaii Rule of Appellate Procedure 13, on the ground that the cases presented *important state law issues of first impression.* As *Smith* makes clear, the Ninth Circuit regularly invokes statutory certification devices enacted by state legislatures to assist a federal court in determining state law questions determinative of pending causes; further, it does so in cases presenting *important state law issues of first impression.*

This case is one which, plainly, presents an important state law issue of first impression: the question (thus far never discussed in any California appellate opinion) of whether unauthorized use of the likeness of a deceased celebrity is exempted under section 990(n), is obviously of considerable significance in the state of California (in par-

ticular, southern California), where the film industry is enormously important and wields considerable economic influence. It should be noted in connection with this point that *amicus* briefs were filed on behalf of CBS Inc., Fox, Inc., National Broadcasting Co., Inc. and Warner Bros. in support of Best, while *amicus* briefs in support of Astaire were filed by Mr. and Mrs. Frank Sinatra, Mr. and Mrs. Bob Hope, Charlton Heston, Ms. Katherine Hepburn, the Screen Actors Guild, Inc., American Society of Composers, Authors and Publishers and Wayne Enterprises Ltd. (John Wayne). App., *infra*, B-5.

Indeed, Judge Schroeder's example of a fashion videotape introduced by the unauthorized use of footage of Jacqueline Kennedy underscores the scope of the statute and the potential dire implications of the panel majority's construction of its provisions: under the majority's reasoning, the likeness of *any* deceased celebrity may potentially be used, without authorization, to promote the purchase of commercial products. To the extent that *other* state legislatures interested in enacting statutes which purport to balance First Amendment rights with the right of publicity look to section 990 for guidance, the panel majority's interpretation of its exemption provision could play a role unintended by the California legislature that enacted the section originally.

In sum, the question of whether section 990(n) exempts the unauthorized use of a deceased personality's likeness is one which the California Supreme Court is most qualified to resolve.

II.

Given The Panel Majority's Statement That The Statute Is A "Fairly Convoluted Statutory Scheme," The California Supreme Court Should Be Given The Opportunity To Resolve The State Law Question.

The panel that decided this case acknowledged that the provisions set forth in California Civil Code section 990 constitute a "fairly convoluted statutory scheme." In addition, a dissenting member of the panel rejected the majority's interpretation of section 990(n), and offered an alternative reading of the statute. The majority's characterization, along with the presence of a dissenter, raises questions about the lower court's construction and interpretation of section 990(n). More precisely, it is by no means certain the California Supreme Court would adopt the statutory interpretation espoused by the panel majority.

In *White v. Celotex Corp.*, 907 F.2d 104, 106 (9th Cir. 1990), the Ninth Circuit denied a motion to certify to the Arizona Supreme Court the question of whether Arizona would adopt the theory of market share liability in asbestos litigation. In denying the motion, the court observed that "[t]here was no reason to certify the question of market share liability to the Supreme Court of Arizona" since there was no evidence the defendants had been in the market at the relevant time. Moreover, the theory of market share liability was not relevant to the asbestos litigation in *White*, for a variety of reasons. *Ibid.* The court of appeals concluded that it was "highly unlikely that the Supreme Court of Arizona would adopt such a theory in the sort of litigation involved. *Ibid.* Since the question was "not close," the "district court did not err in exercising its discretion to deny certification." *Ibid.*

The Ninth Circuit in *White* did not exercise its discretion to certify a state-law issue to the highest state court because

there were no grounds upon which to believe that the issue was a "close" one that required resolution. The facts in this case are clearly different. In Astaire, the panel majority opined that there is a "fairly convoluted statutory scheme," there was, and is, no California appellate court opinion interpreting Civil Code Section 990 and one of the panelists issued a dissenting opinion. This is not a "close" call; certification would have been appropriate. If this question is not certified to the California Supreme Court, either by the Ninth Circuit Court of Appeals or by this Court, a federal court will have decided an important state law issue of first impression which should have ultimately been decided by the California Supreme Court. This alone justifies exercise of this Court's supervisory power: California Rule of Court 29.5 was enacted *precisely* to enable federal courts to direct matters of state law to the state's highest court; refusal of the court of appeals in this case to defer to the California Supreme Court on an important state-law issue of first impression frustrates the purpose underlying this rule. By vacating the judgment and either remanding for reconsideration of certification to the California Supreme Court, or certifying the state-law issue on its own, this Court will realize the objective of California Rule of Court 29.5.

CONCLUSION

The petition for a writ of certiorari should be granted, and the state-law issue should be certified (ether by this Court or, on remand, by the Ninth Circuit Court of Appeals) to the California Supreme Court under California Rule of Court 29.5.

Respectfully submitted,

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